

STATE OF MICHIGAN
COURT OF APPEALS

FIEGER FIEGER KENNEY GIROUX &
DANZIG PC, an assumed name of FIEGER &
FIEGER PC,

UNPUBLISHED
September 16, 2014

Plaintiff/Counter Defendant/Cross-
Plaintiff-Appellant,

v

No. 315732
Wayne Circuit Court
LC No. 11-014040-NZ

DENNIS A DETTMER,

Defendant/Counter Plaintiff-
Appellee,

and

DENNIS A DETTMER PLLC, PAUL W
BROSCHAY, and LAW OFFICES OF PAUL W
BROSCHAY PLLC,

Defendants-Appellees,

and

THOMAS M LIZZA,

Defendant/Cross-Defendant-
Appellee,

and

BONE BOURBEAU BOURBEAU & LIZZA
PLLC,

Defendant.

FIEGER FIEGER KENNEY GIROUX &
DANZIG PC, an assumed name of FIEGER &
FIEGER PC,

Plaintiff/Counter Defendant/Third
Party Plaintiff-Appellant,

v

No. 315733
Wayne Circuit Court
LC No. 12-009493-NZ

DENNIS A DETTMER,

Defendant/Counter Plaintiff-
Appellee,

and

DENNIS A DETTMER PLLC,

Defendant-Appellee,

and

THOMAS M LIZZA,

Third Party Defendant-Appellee.

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

In this consolidated appeal, Fieger, Fieger, Kenney, Giroux & Danzig, PC (“Fieger”) appeals as of right the trial court’s March 7, 2013 order granting the motions for summary disposition of Dennis A. Dettmer and Dennis A. Dettmer, PLLC (hereinafter “Dettmer”), Paul W. Broschay and the Law Offices of Paul W. Broschay, PLLC (hereinafter “Broschay”), and Thomas M. Lizza in Case No. 11-014040-NZ;¹ as well as sua sponte granting summary disposition in favor of Dettmer in Case No. 12-009493-NZ,² in both cases based on the doctrine of res judicata. We affirm in part and reverse in part.

This appeal arises out of two cases that were referred to Fieger by Dettmer. The first case was a federal civil rights case brought by Jeffrey Michael Moldowan in the United States District Court for the Eastern District of Michigan in 2005 before the Honorable David M. Lawson (hereinafter “*Moldowan* case”). The second case is a wrongful death case that was filed in 2003

¹ Docket No. 315732.

² Docket No. 315733.

and was brought by the Estate of Jamar Cortez Jones in the Wayne Circuit Court before the Honorable Robert L. Ziolkowski (hereinafter “*Jones case*”).

I. THE *MOLDOWAN* CASE AND CASE NO. 11-014040-NZ

Dettmer referred the *Moldowan* case to Fieger in 2009. In 2011, Moldowan’s relationship with Fieger was terminated, and a lien for fees was filed by Fieger thereafter. The *Moldowan* case then settled. A dispute arose over the fees Fieger was entitled to in the *Moldowan* case, which was resolved by Judge Lawson based on quantum meruit in a detailed opinion.³ Judge Lawson determined in a supplemental opinion that Fieger was entitled to \$63,372.50 in attorney fees.⁴

On November 11, 2011, Fieger filed a lawsuit in the Wayne Circuit Court against Dettmer, Broschay, and Lizza related to the *Moldowan* case, Case No. 11-014040-NZ. The first amended complaint alleged causes of action for breach of contract against Dettmer; breach of contract, fraud, breach of fiduciary duty, and conspiracy to commit breach of fiduciary duty against Broschay and Lizza; and conspiracy to commit fraud, tortious interference with contractual relations, and conspiracy to commit tortious interference with contractual relations against Dettmer, Broschay, and Lizza. This case was before the Honorable John H. Gillis, Jr.

II. THE *JONES* CASE AND CASE NO. 12-009493-NZ

In 2009, Dettmer referred the *Jones* case to Fieger. After a period of time, the Estate re-engaged Dettmer’s representation. Fieger subsequently filed a lien for fees, and was notified that the case settled on July 16, 2012. A dispute regarding Fieger’s entitlement to fees in the *Jones* case was resolved based on quantum meruit, and it was ordered that Fieger receive \$10,000 for his representation of the Estate.

Fieger filed a complaint against Dettmer in the Wayne Circuit Court, which was related to the *Jones* case, on July 18, 2012, Case No. 12-009493-NZ. The complaint alleged breach of contract, fraud, and tortious interference with contractual relations. This case was also before Judge Ziolkowski.

III. CONSOLIDATION OF CASE NOS. 11-014040-NZ AND 12-009493-NZ

On December 17, 2012, Case No. 12-009493-NZ was reassigned to Judge Gillis and on January 11, 2013, Case Nos. 11-014040-NZ and 12-009493-NZ were consolidated. On February 27, 2013, the trial court held a motion hearing, at which the court granted Dettmer, Broschay, and Lizza’s motions summary disposition in Case No. 11-014040-NZ pursuant to the doctrine of res judicata based on the federal court’s decision in the *Moldowan* case. Additionally, in Case

³ *Moldowan v City of Warren*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued January 2, 2013 (Case No. 05-70331).

⁴ *Moldowan v City of Warren*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued March 18, 2013 (Case No. 05-70331).

No. 12-009493-NZ, the trial court sua sponte granted summary disposition in favor of Dettmer pursuant to the doctrine of res judicata based on Judge Ziolkowski's opinion in the *Jones* case. This appeal followed. While Case Nos. 11-014040-NZ and 12-009493-NZ were consolidated, the appeals will be discussed separately below.

IV. APPEAL OF CASE NO. 11-014040-NZ

In Docket No. 315732, Fieger argues that the trial court erred in granting summary disposition in favor of Dettmer, Broschay, and Lizza in Case No. 11-014040-NZ. We agree, in part.

Fieger challenges the trial court's ruling that Judge Lawson's opinion in the *Moldowan* case constituted res judicata warranting the dismissal of Fieger's claims against Dettmer, Broschay, and Lizza. MCR 2.116(C)(7) relates to motions for summary disposition based on a "prior judgment." This Court reviews both a motion for summary disposition brought pursuant to MCR 2.116(C)(7) and "[t]he applicability of the doctrine of res judicata [which] presents a question of law," de novo.⁵

Because the opinion and order in the *Moldowan* case was entered by a federal court, "[t]his Court must apply federal law in determining whether the doctrine of res judicata requires dismissal" of Fieger's case against Dettmer, Broschay, and Lizza.⁶

Under federal law, res judicata precludes a subsequent lawsuit if the following elements are present: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their privies; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action.^[7]

Fieger asserts that Judge Lawson's January 2, 2013 opinion and order in the *Moldowan* case was not a final order at the time the trial court granted summary disposition so the dismissal was improper. After his initial order, Judge Lawson entered a supplemental order regarding the distribution of fees on March 18, 2013, advising the parties of the fees to which Fieger was entitled. On March 13, 2014, Judge Lawson's orders regarding the distribution of fees were affirmed by the Sixth Circuit Court of Appeals.⁸ Because there is a final decision on the merits

⁵ *Glaubius v Glaubius*, ___ Mich App ___, ___; ___ NW2d ___ (2014); slip op at 8; *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 518; 847 NW2d 657 (2014).

⁶ *Beyer v Verizon North, Inc*, 270 Mich App 424, 428-429; 715 NW2d 328 (2006).

⁷ *Id.* at 429 (citation and quotation marks omitted).

⁸ *Moldowan v City of Warren*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued March 13, 2014 (Case No. 13-1361).

regarding the distribution of fees in the *Moldowan* case, this element of the doctrine of res judicata is satisfied.⁹

Fieger also unsuccessfully argues that the *Moldowan* case did not involve the same parties or their privies. The dispute regarding Fieger's entitlement to fees in the *Moldowan* case involved Fieger, Dettmer, Broschay, and Lizza, the same parties to the subsequent action, Case No. 11-014040-NZ.¹⁰ Thus, this argument must fail.

Next, Fieger claims that the causes of action in Case No. 11-014040-NZ were not actually litigated and could not have been litigated in federal court. As explained above, Fieger brought the following causes of action in Case No. 11-014040-NZ: breach of contract against Dettmer; breach of contract, fraud, breach of fiduciary duty, and conspiracy to commit breach of fiduciary duty against Broschay and Lizza; and conspiracy to commit fraud, tortious interference with contractual relations, and conspiracy to commit tortious interference with contractual relations against Dettmer, Broschay, and Lizza. A review of the first amended complaint reveals that the breach of contract claim against Dettmer relates to the fees Fieger claims it was entitled to pursuant to the referral agreement in the *Moldowan* case. That issue was litigated before Judge Lawson based on quantum meruit and Judge Lawson specifically found in his January 2, 2013 opinion and order that Fieger was not entitled to recovery for fees based on breach of the referral agreement.¹¹ Additionally, because the breach of contract claim against Dettmer in the instant case and the fee dispute involving Dettmer in the *Moldowan* case "arose out of the same core operative facts," there is an identity of the causes of action.¹² Thus, the trial court properly dismissed the cause of action for breach of contract against Dettmer based on res judicata.

The first amended complaint's other causes of action, however, were not litigated in the federal court.¹³ With regard to Fieger's claim against Broschay and Lizza for breach of contract, Judge Lawson specifically stated that the federal court did "not intend to adjudicate a contract dispute between Broschay and the Fieger Firm concerning the former's departure from the law firm and any accounting that may be due." Judge Lawson, however, did state that "to the extent that the severance conditions impact the adjudication of the lien the Fieger Firm asserts in this case, the Court has jurisdiction to consider the validity and application of that severance condition." The trial court noted that the enforceability of such "poison pill" agreements was questionable, but found that "the Fieger Firm's employment contract with [Broschay]^[14] has no

⁹ See *Beyer*, 270 Mich App at 429.

¹⁰ See *id.*

¹¹ See *id.*

¹² *RDM Holdings, LTD v Continental Plastics Co*, 281 Mich App 678, 712; 762 NW2d 529 (2008).

¹³ See *Beyer*, 270 Mich App at 429.

¹⁴ Broschay and Lizza's employment agreements with Fieger purportedly contain the same severance condition, which states that if either leaves the firm and takes with him "any case not

bearing on the determination of the lien in [the *Moldowan*] case.”¹⁵ Thus, to the extent the cause of action for breach of contract against Broschay and Lizza requests damages in the form of fees from the *Moldowan* case, relief in the form of fees cannot be appropriately granted based on res judicata.

This Court notes that, with regard to the other causes of action, Fieger’s first amended complaint and requests for damages focus almost entirely on how the alleged torts (and the conspiracy to commit those torts) of Dettmer, Broschay, and Lizza affected the fees Fieger is entitled to from the *Moldowan* case. Again, the trial court is prohibited from awarding Fieger additional fees from the *Moldowan* case based on the doctrine of res judicata. Fieger, however, also requests “exemplary damages” for those causes of action, recovery for which would not be prohibited by res judicata to the extent that those damages are separate and apart from the *Moldowan* fees.

Fieger is also correct that his claims, other than for breach of contract against Dettmer, could not have been litigated in federal court. The supplemental jurisdiction of federal courts has been outlined by Congress.¹⁶ A federal court may exercise supplemental jurisdiction over fee disputes arising out of an action over which it has original jurisdiction.¹⁷ Judge Lawson’s January 2, 2013 opinion and order only addressed issues related to the fee dispute for the *Moldowan* case. Thus, Fieger’s additional claims for fraud, breach of fiduciary duty, and conspiracy to commit breach of fiduciary duty against Broschay and Lizza; and conspiracy to commit fraud, tortious interference with contractual relations, and conspiracy to commit tortious interference with contractual relations against Dettmer, Broschay, and Lizza could not have been litigated in the federal court.¹⁸

Based on the above, the trial court appropriately granted summary disposition of Fieger’s claim for breach of contract against Dettmer, but erred in dismissing the remaining causes of action in Case No. 11-014040-NZ. Accordingly, reversal in part is warranted.¹⁹

brought into the Firm” by him, he has to pay a penalty of \$150,000 per case and 95% of “all attorney fees generated by each such case.”

¹⁵ Footnote added.

¹⁶ See *Johnson v Micron Technology, Inc.*, 354 F Supp 2d 736, 742 (ED Mich, 2005).

¹⁷ *TC Power Ltd v Guardian Indus Corp.*, 969 F Supp 2d 839, 840-841 (ED Mich, 2013).

¹⁸ See *Beyer*, 270 Mich App at 429. Based on this Court’s finding that the third element of the doctrine of res judicata was not satisfied, it is unnecessary for us to address Fieger’s arguments regarding the fourth element for these causes of action.

¹⁹ Broschay also argued in its motion for summary disposition that summary disposition of the causes of action against it was proper pursuant to MCR 2.116(C)(10). A review of the motion, response, and exhibits demonstrates that it was premature for Broschay to bring a motion pursuant to that subsection because Dettmer, Broschay, and Lizza had not been deposed at the time of the motion’s filing. See *Colista v Thomas*, 241 Mich App 529, 537; 616 NW2d 249 (2000). Thus, this Court will not consider Broschay’s arguments under MCR 2.116(C)(10).

V. APPEAL OF CASE NO. 12-009493-NZ

In Docket No. 315733, Fieger contends that the trial court erred in sua sponte granting summary disposition in favor of Dettmer in Case No. 12-009493-NZ. We also agree, in part.

The trial court dismissed Fieger's claims based on the doctrine of res judicata. Specifically, it ruled that Judge Ziolkowski's decision regarding attorney fees in the *Jones* case resolved all of Fieger's claims in Case No. 12-009493-NZ.²⁰ The trial court did not specify the subrule of MCR 2.116 pursuant to which it granted summary disposition; however, as discussed above, "the correct subrule for summary disposition based upon a prior order is (C)(7)."²¹ Thus, we also review this issue under the standard for motions brought under MCR 2.116(C)(7). "Whether a party has been afforded due process is [also] a question of law" subject to de novo review.²²

Fieger argues that the trial court's decision to grant summary disposition sua sponte without Dettmer having filed a motion for summary disposition and without providing Fieger an opportunity to respond violated its due process rights. MCR 2.116(I)(1) provides: "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." "Under this rule, a trial court has authority to grant summary disposition sua sponte, as long as one of the two conditions in the rule is satisfied."²³ "However, the trial court may not do so in contravention of a party's due process rights."²⁴ "The basic requirements of due process in a civil case include notice of the proceeding and a meaningful opportunity to be heard."²⁵ "Where a court considers an issue sua sponte, due process can be satisfied by affording a party an opportunity for rehearing."²⁶

[A]ny error by a court in granting summary disposition sua sponte without affording a party an adequate opportunity to brief an issue and present it to the

²⁰ The trial court's statements indicate that it also granted summary disposition in favor of Lizza. Lizza was a third party defendant in this case. Fieger's third-party complaint against Lizza alleged tortious interference and related to Dettmer's counterclaim, which involved a third case (*Townsend v Kasle Steel Corp*). Fieger sought to recover to the extent that Dettmer recovered on the counterclaim. However, at the hearing, the trial court granted summary disposition in favor of Fieger on the counterclaim. Because Dettmer did not recover, it appears that the third party claim is no longer at issue.

²¹ *Wells Fargo Bank, NA*, 304 Mich App at 517.

²² *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009).

²³ *Id.* at 485.

²⁴ *Id.* at 489.

²⁵ *Id.* at 485.

²⁶ *Id.* at 485-486.

court may be harmless under MCR 2.613(A), if the party is permitted to fully brief and present the argument in a motion for reconsideration.^[27]

In the present case, summary disposition was granted sua sponte based on res judicata, as Dettmer had not filed a motion raising the issue. Although Fieger may not have had notice that the issue of res judicata would be raised at the summary disposition hearing with regard to its claims in Case No. 12-009493-NZ,²⁸ the trial court fulfilled its “responsibility to provide [Fieger] the opportunity to be heard on the issue.”²⁹ Fieger argued at the hearing that Judge Lawson’s ruling had nothing to do with this case and Judge Ziolkowski did not make any substantive rulings on the claims in this case. The trial court acknowledged Fieger’s arguments, but stated that its ruling was based on the fact that the fee was settled by Judge Ziolkowski. The court was not dismissive of Fieger’s counsel and considered their arguments.³⁰ Thereafter, Fieger filed a motion for reconsideration in which it reiterated the arguments that Judge Lawson’s ruling did not apply, it was not a final order, and that Judge Ziolkowski did not rule on the claims. The trial court denied the motion without explanation. However, unlike the motion for reconsideration in *Al-Maliki*, the case on which Fieger relies, Fieger provided no new evidence and made the same arguments in its motion as were made at the hearing, which the trial court had already rejected.³¹ Accordingly, due process was satisfied and no procedural error occurred.³²

Fieger further argues that the trial court erred in granting summary disposition because the trial court had no factual basis for its decision, as it did not have the transcript of the hearing at which Judge Ziolkowski made his ruling. Based on the date that the transcript of the December 12, 2012 hearing was filed with the Wayne Circuit Court, it appears that the trial court did not have the transcript before it when it found that summary disposition was appropriate. Thus, it must have relied on the “Order for Quantum Meruit Award,” which merely provided that Fieger was entitled to an award of attorney fees based on quantum meruit in the amount of \$10,000, “for the reasons stated on the record[.]”

Nonetheless, a review of the transcript of the December 12, 2012 hearing reveals that Judge Ziolkowski did not provide any additional reasoning for the decision that would have been necessary for the trial court to review in order to make its decision in this case. At the hearing, Judge Ziolkowski indicated that he had informed the attorneys in chambers “that once the Fieger firm was discharged if that [sic] they had the opportunity to put a lien on the file then that lien would then be considered a quantum meruit resolution of what their services were valued at and

²⁷ *Id.* at 486.

²⁸ We note that Fieger was, however, aware that res judicata was raised with regard to his claims in Case No. 11-014040-NZ.

²⁹ *Al-Maliki*, 286 Mich App at 489.

³⁰ *Cf. id.*

³¹ *See id.*

³² *See id.*

what they performed in this matter.” Judge Ziolkowski further indicated that no one objected to the court’s statements and that “a reasonable resolution of this matter would be a payment to the Fieger firm of 10 thousand dollars for the quantum meruit services that they performed[.]” The attorneys then indicated their satisfaction with the resolution. In this case, the trial court resolved the matter based on the doctrine of res judicata because of Judge Ziolkowski’s decision resolving the attorney fee dispute. The trial court was aware that Judge Ziolkowski’s ruling was based on quantum meruit and the transcript of the hearing would not have affected its decision. Thus, the trial court did not err in ruling without such evidence before it.

Finally, Fieger argues that the doctrine of res judicata does not apply because Judge Ziolkowski’s resolution of the attorney fees did not resolve his claims against Dettmer.

Res judicata prevents multiple suits litigating the same cause of action. Specifically, the doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) the decree in the prior decision was a final decision, (3) both actions involved the same parties or their privies, and (4) the matter in the second case was or could have been resolved in the first. Res judicata has been broadly applied, barring, not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.^[33]

Fieger contends that the third and fourth elements are not satisfied because Judge Ziolkowski did not rule on Fieger’s claims against Dettmer and Dettmer was not sued as a party or in its capacity as privy to the parties in the *Jones* case. Although neither Fieger nor Dettmer were parties in the *Jones* case, the *Jones* case involved their privies because both Fieger and Dettmer had represented the Estate at one time.³⁴ Moreover, the action at issue in the prior case is Judge Ziolkowski’s ruling determining the division of fees, which involved a dispute between Fieger and Dettmer. Thus, both actions involved the same parties.³⁵

With regard to the fourth element, whether “the matter in the second case was or could have been resolved in the first,”³⁶ Fieger first alleged that Dettmer breached the referral agreement and sought recovery of the fees pursuant to that agreement plus costs and expenses advanced. This cause of action was resolved in the first case when Judge Ziolkowski ruled that Fieger was entitled to fees based on quantum meruit. Similar to Case No. 11-014040-NZ, in the present case, Fieger is not seeking any damages other than attorney fees for this claim. The

³³ *Glaubius*, ___ Mich App at ___; slip op at 8 (citations and quotation marks omitted).

³⁴ See *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 12-13; 672 NW2d 351 (2003) (“[A] privy includes a person so identified in interest with another that he represents the same legal right, such as a principal to an agent . . .”).

³⁵ See *Glaubius*, ___ Mich App at ___; slip op at 8.

³⁶ *Id.* at ___; slip op at 8.

matter of attorney fees was resolved in the first case. Thus, this claim is barred by the doctrine of res judicata.³⁷

Next, Fieger alleged fraud and tortious interference. Similar to Case No. 11-014040-NZ, exemplary damages were sought in addition to attorney fees. These causes of action were not litigated in the attorney fee dispute in the *Jones* case. Moreover, while they arise from the same transaction, they could not have been raised in the first case in which Judge Ziolkowski was solely determining the attorney fees.³⁸ Accordingly, the trial court erred in concluding that res judicata applied to these causes of action and in granting summary disposition on the fraud and tortious interference claims.³⁹ This Court notes, however, that Fieger's entitlement to attorney fees from the *Jones* case has already been determined and as such would be prohibited as damages for these causes of action based on res judicata.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot

³⁷ See *id.* at ____; slip op at 8.

³⁸ See *id.* at ____; slip op at 8. Judge Ziolkowski also ruled that Case No. 12-009493-NZ would be transferred to Judge Gillis for resolution of the remaining issues in that case.

³⁹ See *id.* at ____; slip op at 8; *Wells Fargo Bank, NA*, 304 Mich App at 518.